PP v. AJIM OTOH

HIGH COURT SABAH & SARAWAK, SANDAKAN
MAIRIN IDANG JC
[CRIMINAL CASE NO: SDK-43-2-3-2016]
16 MARCH 2016

CRIMINAL PROCEDURE: *Bail – Granting of – Application for revision against grant of bail by Sessions Court Judge – Accused charged under s. 12(2) of Dangerous Drugs Act 1952 ('DDA') punishable under s. 39A(2)(r) of DDA – Whether unbailable offence – Whether s. 41B of DDA prevailed over s. 388(1) of Criminal Procedure Code – Whether grant of bail should be set aside*

The accused together with another person was charged under s. 12(2) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39A(2)(r) of the same Act read together with s. 34 of the Penal Code for being in joint possession of 31.55g of methamphetamine. The Sessions Court Judge ('SCJ') allowed bail for the accused. Dissatisfied, the prosecution filed an application for revision against the grant of bail on the grounds, *inter alia*, that s. 41B of the DDA is a specific provision with regard to bail for offences under the DDA and that based on the principle of *generalibus specilia derogant*, s. 41B of the DDA prevailed over s. 388(1) of the Criminal Procedure Code ('CPC'). On the other hand, the accused referred, *inter alia*, to the case of *Bird Dominic Jude v. PP* to support his contention that bail should be granted and maintained in his favour.

Held (allowing prosecution's application; setting aside bail granted to accused):

(1) Section 41B of the DDA clearly states that bail shall not be granted where the accused is charged with offences under the DDA notwithstanding any other written law or any rule of law to the contrary. Based on the principle of *generalibus specilia derogant*, the provision of s. 41B of the DDA prevailed over the provision of s. 388(1) of the CPC. (para 9)

(2) The case of *Bird Dominic Jude* was of no help to the accused. In that case, the accused was discharged and acquitted by the High Court and the prosecution appealed and also applied under s. 56A of the Courts of Judicature Act 1964 for the accused to be arrested and remanded pending disposal of the appeal. The Court of Appeal held that the balance of justice lay in favour of granting bail to the accused until the disposal of the prosecution's appeal. The case of *Bird Dominic Jude* should be looked at from its facts where in that case the accused was already acquitted but there was an appeal by the prosecution so the granting of bail was in order, where else, in the present facts of the case, the accused's trial has yet to start. (paras 10 & 11)

Case(s) referred to:
Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(dist)***
Moh Ting King v. PP [1996] 2 CLJ 325 HC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Chua Chor Kian [1997] 1 LNS 447 HC ***(refd)***
PP v. Ilamaran Kanniappan [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224 HC ***(refd)***
Soo Shiok Liong v. PP [1993] 2 CLJ 657 HC ***(refd)***
Yap Sooi Kim v. PP [1989] 2 CLJ 242; [1989] 2 CLJ (Rep) 688 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 56A
Criminal Procedure Code, s. 388(1)
Dangerous Drugs Act 1952, ss. 12(2), 39A(2)(r), 39B(1)(a), 41B
Penal Code, s. 34

For the applicant - Mohd Faisal Md Noor; DPP
For the respondent - Hamida Ambo; M/s Ambo & Co

Reported by Sandra Gabriel

JUDGMENT

Mairin Idang JC:

[1] I shall refer to the applicant as the prosecution and the respondent as the accused. This is an application for revision in respect of the bail granted to the accused on 17 December 2015.

[2] The accused together with another person was charged under s. 12(2) of the Dangerous Drugs Act 1952 punishable under s. 39A(2)(r) of the same Act (the DDA) read together with s. 34 of the Penal Code for being in joint possession of 31.55g of methamphetamine (the charge). Both the accused persons pleaded not guilty. The learned Sessions Court Judge (SCJ) allowed bail for the accused subject to certain conditions stipulated therein. The prosecution was not happy with the bail granted. Hence this application for revision.

[3] The prosecution submitted that this court should set aside the order of the learned SCJ in granting the bail to the accused for the following reasons:

(i) The relevant s. 41B of the DDA is a specific provision with regard to bail for offences under the DDA and that based on the principle of *generalibus specilia derogant*, the provision of s. 41B of the DDA prevails over the provision of s. 388(1) of the Criminal Procedure Code (CPC).

(ii) The provision of s. 41B of the DDA is mandatory therefore where the offence is punishable under s. 39A(2)(r) of the DDA the same is unbailable where the court has no discretion to grant bail unlike a non-bailable offence which s. 388(1) CPC is applicable.

[4] The prosecution had referred to me the cases of *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119, *PP v. Chua Chor Kian* [1997] 1 LNS 447; [1998] 1 MLJ 167, *PP v. Ilamaran Kanniappan* [1992] 1 CLJ 492; [1992] 3 CLJ (Rep) 224; [1992] 1 MLJ 672 and *Yap Sooi Kim v. PP* [1989] 2 CLJ 242; [1989] 2 CLJ (Rep) 688; [1989] 1 MLJ 44.

[5] The accused submitted that the bail should be maintained. He said the purpose of bail is to secure his attendance at the trial and that "the granting of bail is a judicial act and it is the court that must decide whether there are reasonable grounds for believing that the accused has been guilty of an offence punishable with life imprisonment". He also said the principle of "a person is innocent until proven guilty" must be taken into consideration in maintaining the bail (See *Soo Shiok Liong v. PP* [1993] 2 CLJ 657; [1993] 2 MLJ 381 and *Moh Ting King v. PP* [1996] 2 CLJ 325; [1995] 3 MLJ 461).

[6] The accused had also referred to *Bird Dominic Jude v. PP* [2014] 4 CLJ 133 (FC) where Zulkefli Makinudin CJ (Malaya) held: "(21) ... It is our judgment that the power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against acquittal of a capital offence such as drug trafficking, the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court." The accused therefore submitted, taking into account the case of *Bird Dominic Jude*, *supra* this court should maintain the bail granted by the learned SCJ.

[7] In his oral submission, the prosecution submitted that in *Bird Dominic Jude* the accused was discharged and acquitted therefore the facts therein are distinguishable from the present case where the trial has yet to start.

[8] Let me start by reproducing ss. 12(2), 39A(2)(r) and 41B of the Dangerous Drugs Act 1952:

> Section 12(2): No person shall have in his possession, custody or control of any dangerous drug to which this Part applies unless he is authorised to be in possession, custody or control of such drug or is deemed to be so authorised under this Act or the regulations made thereunder.
>
> Section 39A(2)(r): Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offences is - (r) 30 grammes or more in weight of Methamphetamine; shall instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and shall also be punished with whipping of not less than ten strokes.

Section 41B:

(1) Bail shall not be granted to an accused person charged with an offence under this Act:

(a) Where the offence is punishable with death; or

(b) Where the offence is punishable with imprisonment for more than five years; or

(c) Where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) The provisions of subsection (1) shall have the effect notwithstanding any other written law or any rule of law to the contrary.

[9] Section 41B of the DDA clearly states that bail shall not be granted where the accused is charged with offences under the DDA notwithstanding any other written law or any rule of law to the contrary. Based on the principle of *generalibus specilia derogant* the provision of s. 41B of the DDA prevails over the provision of s. 388(1) of the Criminal Procedure Code (CPC). This legal maxim of *generalibus specilia derogant* which simply means that where a written law has specifically provided for a matter, that will override the general provisions respecting it. I agree with the learned DPP on this and I also find support of this from those cases cited by the prosecution.

[10] Is the case of *Bird Dominic Jude* of any help to the accused? I do not think so. The facts in that case were that the accused was charged under s. 39B(1)(a) of the DDA but he was discharged and acquitted by the High Court. The appellant (prosecution) appealed and also applied under s. 56A of the Courts of Judicature Act 1964 for the respondent (accused) to be arrested and remanded in prison pending disposal of the appeal at the Court of Appeal. Upon balancing the relevant factors, the Court of Appeal held that the balance of justice lay in favour of granting bail to the respondent until disposal of the prosecution's appeal. The appellant's appeal to the Federal Court was dismissed but more importantly is what the Federal Court had held at para. (4) "... The power to remand the appellant or admit him to bail pending the disposal of the appellant's appeal by the Court of Appeal was necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the appellant. It would not be desirable that pending the appeal against the acquittal of capital offence such as drug trafficking; the acquitted person should remain at large without conditions while his fate has yet to be decided by the appellate court."

[11] I agree with the prosecution that the case of *Bird Dominic Jude* should be looked at from its facts where in that case the respondent was already acquitted but there was an appeal by the prosecution so the granting of bail was in order, whereas here the accused's trial has yet to start.

[12] I therefore allow the prosecution's application for revision and set aside the bail granted to the accused by the learned SCJ. The deposit of RM15,000 is to be refunded to the accused. I so order.